Supreme Court, U.S.
FILED
APR 1 1991
OFFICE OF THE CLERK

3

No. 90-1380

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1990

CITY OF AUSTIN, TEXAS,
Petitioner

V.

JOLEEWU, LTD.,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL P. GIBSON
Burleson, Pate & Gibson
2414 N. Akard
Dallas, Texas 75201
(214) 871-4900
ATTORNEY OF RECORD

ROBERT D. LYBRAND
8333 Douglas Avenue
Suite 1215 - LB 48
Dallas, Texas 75225
(214) 369-1077

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals had discretion to reverse the Trial Court's Order of Dismissal based upon the doctrine of equitable estoppel.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW . . . i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

JURISDICTION 1

RESPONSE TO PETITIONER'S STATEMENT 2

ARGUMENT 3

The issue of inapplicability of res judicata was raised by the Respondent. 9

The Appeals Court has discretion to consider an issue not raised by Respondent's brief. . . . 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Ellingson, v. Burlington Northern, Inc., 653 F.2d 1327 (9th Cir. 1981) 13

In re HECI Exploration Co., Inc., 862 F.2d 513 (5th Cir. 1988) 13

Kincade v. General Tire & Rubber Co., 635 F.2d 501 (5th Cir. 1981) 12

Sparks v. Duval County Ranch Co., Inc., 604 SF.2d 976 (5th Cir. 1979, aff. other grounds, 449 U.S. 24 1980) 12

STATUTES

28 U.S.C. Sec. 1254 (1) 1

FED. R. APP. P. 28 10

STATEMENT OF THE CASE

The "Opinions Below" section of the Petition for Writ of Certiorari accurately summarizes the proceedings below. Petitioner's "Statement of Jurisdiction" does not share that accuracy.

JURISDICTION

Petitioner confuses the Supreme Court's jurisdiction to entertain the Writ of Certiorari with the Supreme Court's statement of its considerations in granting that discretionary review.[1]

The Supreme Court of the United States has jurisdiction to review this decision of the Fifth Circuit Court of Appeals Court under 28 U.S.C. Sec. 1254 (1) as this is a Petition for Writ of Certiorari by a party to a civil case

---

[1] Pet. at 2-5.

after rendition of decree.

The Supreme Court should not grant a Writ of Certiorari in this case as the conduct of the Fifth Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings.

RESPONSE TO PETITIONER'S STATEMENT

Petitioner's "Statement" contains a generally accurate recitation of facts until it strays into argument. Respondent take exception to Petitioner's assertions that "... the Fifth Circuit in effect became counsel for Joleewu, Ltd.,..." and denied "... the City of Austin due process and effective assistance of Counsel."[2] Respondent likewise takes exception to Petitioner's claim that the Court of Appeals "... did not follow the Federal Rules of Appellate

---

[2] Pet. at 8.

Procedure...".[3] It is Respondent's position that those statements are not correct.

Just as Petitioner's "Statement" section contains material more accurately labeled argument, Petitioner's "Argument" section includes assertions of fact.[4] Any response to factual misstatements in Petitioner's arguments will be contained in the corresponding section of this brief.

ARGUMENT

Respondent's Appeal Brief clearly raised the issue of the inapplicability

---

[3] Pet. at 9.

[4] Petitioner characterizes Respondent's Appeal Brief as stating only "...that damages sought in the present case were excluded from the condemnation case." Pet. at 14.

of res judicata.[5] The last paragraph of Respondent's res judicata arguments states:

"The attorneys for both AUSTIN [Petitioner] and JOLEEWU [Respondent] recognized that the commissioners' hearing was not the forum for such a recovery. (Tr. 167-170, Appendix)[6]. The damages sought by JOLEEWU in this case were clearly excluded from the commissioners' award by both applicable law and agreement of the parties, thus the judgment cannot be a bar to litigation involving the recovery of those

---

[5] Res. App. at 1-6.

[6] Pages "Tr. 167-170", as contained in Respondent's Record Excerpts filed with the Court of Appeals, are attached hereto as App. 7 through App. 14.

damages."[7]

Petitioner asserts that the issue upon which the Court of Appeals based its decision was "never stated, raised or briefed at any level."[8] The language quoted above puts into issue the effect of the statement at the commissioner's hearing on the use of the condemnation judgment as a bar to this litigation.

A review of the excerpts of Respondent's Appeal Brief shows that the issue of res judicata was raised, just as it shows that no authority on "equitable estoppel" was offered.[9] Respondent's oral argument before the Court of Appeals did not include arguments regarding equitable estoppel, nor for that matter,

---

[7] *Id.* at 3.

[8] Pet. at 4.

[9] Res. App. 1 - 6.

any argument regarding res judicata.[10]

The conspicuous absence of two items taint the Petitioner's cry of ambush and unfair advantage. The first is the absolute failure to assail the correctness of the Court of Appeals' decision. The second is the unexplained absence of Respondent's Appeal Brief from the materials brought forward by Petitioner.

Missing from the accusations of "hometown officiating" is any accusation

---

[10] Circuit Judge Jones informed Respondent at the outset of its argument that Respondent's interpretation of res judicata had been found lacking but reversal would nevertheless occur based on equitable estoppel. Like the condemned who observes the rope being cut just as it tightens around his neck, counsel moved on to other issues without comment about the discomfort of the noose.

that the call was wrong. The Petitioner does not assert that the decision was wrong, but only that it was based upon an issue that the Court of Appeals could not consider.

The second omission, Petitioner's failure to include any part of Respondent's Appeal Brief in the materials brought forward to this Court, is even more revealing. The very device of judicial ambush is omitted as proof of the foul deed. The reason for this omission is the marked contrast between the contents of Respondent's Appeal Brief[11] and Petitioner's characterization of the contents of that brief.[12]

---

[11] Res. App. 1 - 6.

[12] Petitioner characterized Respondent's Appeal Brief as stating only "...that damages sought in the present case were excluded from the

Petitioner also fails offer any legal authority in support of it claim that it was denied due process and effective assistance of counsel. Petitioner's failure to address the merits of the Court of Appeals' decision in its Motion for Rehearing forecloses any due process argument. Respondent is unaware of any law or doctrine that affords a municipality - a legally protected right to effective counsel.[13]

The fundamental weakness of

---

sought in the present case were excluded from the condemnation case." Pet. at 14.

[13] The factual basis for any claim of counsel's ineffectiveness in assisting Petitioner may be ascertained from Court of Appeals' opinion below and the material brought forward to this Court.

Petitioner's argument is exposed by Petitioner's parenthetical redefinition of issue.[14] This semantic juxtaposition is crucial to Petitioner's argument. If issue means issue, and the issue of res judicata was raised, Petitioner has no argument. Neither case nor statutory authority confines the Court of Appeals to the legal theories and case authorities briefed. Petitioner fails to offer any authority for its claim that issue means theory of law. Respondent is unaware of authority for the proposition that issue does not mean issue.

The issue of inapplicability of res judicata was raised by the Respondent.

---

[14] "...by rendering its decision based upon an issue (theory of law) that was never stated, raised or briefed at any level by Respondent, Joleewu, Ltd." Pet. at 4.

FED. R. APP. P. 28(a)(2)&(4)[15] requires the Respondent's brief to contain:

(a) the contentions of the Respondent with respect to the issues presented, and;

(b) the reasons for the contentions, and;

(c) citation to the authorities, statutes, and parts of the record relied upon.

---

[15] FED. R. APP. P. 28(a)(2) states:

"A statement of the issues presented for review."

FED. R. APP. P. 28(a)(4) states:

"An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reason therefor, with citations to the authorities, statues and parts of the record relied on."

The Respondents brief:

(a) contends that the "judgment [condemnation judgment] cannot be a bar to litigation involving the recovery of those [inverse condemnation] damages."[16]

(b) states that the reason for that contention is that the "damages sought by JOLEEWU [Respondent] were clearly excluded form the commissioners' award by both applicable law and agreement of the parties."[17]

(c) contains citations to authority[18] and to the record.[19]

---

[16] Res. App. at 5.

[17] Res. App. at 5.

[18] Case authority on equitable estoppel was not included among the authority cited in conjunction with the res judicata issue. Case authority on other points was cited. See Res.

The issues raised by an appeal brief are determined by a liberal reading of the brief.[20] A broad statement of an issue can be sufficient to raise another issue even though the overwhelming emphasis of the argument is on another related issue.[21]

Respondent's contention that res judicata should not apply, and the reasons for that contention, were clearly stated. That contention, combined with the citation to the record, was sufficient to raise the issue and apprise

---

App. 1-5.

[19] Res. App. at 5.

[20] *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501 (5th Cir. 1981).

[21] *Sparks v. Duval County Ranch Co., Inc.*, 604 SF.2d 976 (5th Cir. 1979, aff. other grounds, 449 U.S. 24 1980).

both the Court of Appeals and Petitioner that the applicability of res judicata was being challenged because of the agreement of the parties at the condemnation hearing.

The Appeals Court has discretion to consider an issue not raised by Respondent's brief.

The Court of Appeals' consideration of an argument not properly presented is within it discretion.[22] That discretion has been exercised to consider an issue that was not raised in an appellant's brief when the opponent had not been misled and the issue fully explored.[23]

The absence of case authority did

---

[22] *In re HECI Exploration Co., Inc.*, 862 F.2d 513 (5th Cir. 1988).

[23] *Ellingson, v. Burlington Northern, Inc.*, 653 F.2d 1327 (9th Cir. 1981).

not mislead Petitioner. The Respondent clearly argued that the agreement at the condemnation hearing prevented the application of res judicata. It is within the discretion of the Court of Appeals to consider that issue, even if it was not property presented.

CONCLUSION

The Court of Appeals held that res judicata was not applicable because of the agreement of Petitioner and Respondent at the condemnation hearing. The Respondent's Appeal Brief contends that res judicata should not apply because of the agreement of the parties at the condemnation hearing. The absence of a direct reference to case authority on equitable estoppel does not prohibit the Court of Appeals from basing its

decision on that legal theory.

Even if the Respondent's brief was insufficient to raise the issue, it is within the Court of Appeal's discretion to review that issue.

For those reasons, Respondent prays that the Petition for Writ of Certiorari to the Fifth Court of Appeals be denied.

Respectfully submitted,

MICHAEL P. GIBSON
Burleson, Pate &
Gibson
2414 N. Akard
Dallas, Texas 75201
(214) 871-4900
ATTORNEY OF RECORD

ROBERT D. LYBRAND
8333 Douglas Avenue
Suite 1215 - LB 48
Dallas, Texas 75225
(214) 369-1077

APPENDIX

PAGES 7-9 of RESPONDENTS APPEAL BRIEF TO THE COURT OF APPEALS

ARGUMENTS

Standard of Review

The dismissal of JOLEEWU's claims cannot be affirmed unless it appears beyond a doubt that no set of facts in support of the claims would entitle that party to relief. Conley v. Gibson, 355 U.S. 41, (1957). The allegations in the complaint should be construed favorably to the person making the claims. Scheuer v. Rhodes, 426 U. S. 432 (1974).

Plaintiff's Claims are not Barred

A. The Subsequent Condemnation Suit is Not Res Judicata to the Prior Inverse Condemnation Suit

The Court's opinion dismissing

JOLEEWU'S claims quotes the following language from Bonniwell v. Beech Aircraft Corporation, 663 S.W.2d 816, 818 (Tex. 1984):

"Res judicata is frequently characterized as claim preclusion because it bars litigation of all issues connected with a cause of action which, with the use of diligence, might have been tried in the prior suit". Id. at 818. The other cases cited in the trial court's order likewise refer to the case giving rise to the bar as the "former action" or "prior judgment offered in a subsequent action." It is clear that those cases are premised on the fact that the barred claims are those brought in the subsequent suit. The trial court, without explanation, then applies the doctrine to this case in the absence of

that prerequisite. Res judicata does not apply unless that prerequisite has been met; thus, the trial court erred.

B. A Subsequent Suit Cannot Divest A Court of Jurisdiction of Issues Properly Before the Court

The jurisdiction of a court of competent jurisdiction over a matter properly before it cannot be destroyed by a party bringing another action. Cockburn v. Noxon, 135 S.W. 2d (Tex. Civ. App. -- Galveston 1939, error ref'd.).

When two suits are filed involving the same subject matter, issues raised in the first suit are within the jurisdiction of that Court alone. Stanley v. Columbus State Bank, 258 S.W.2d 840, Tex. Civ.App. -- Fort Worth 1953,).

The actions of the Probate Court in the condemnation proceeding could not,

even if the claims in this case have been otherwise within its jurisdiction, adjudicate the claims raised in this case. The claims in this case are not barred by the judgment in the condemnation case.

C. Damages Prior to the Date of Taking Cannot Be Part of the Condemnation Award.

Damages in a condemnation case are determined by the fair market value of the property interest taken at the time of the taking. City of Fort Worth v. Corbin, 504 S.W.2d 828 (Tex. 1974), City of Austin v. Casiraglie, 656 S.W.2d 576 (Tex.Civ.App. -- Austin 1983). The date of the taking is when the condemnor lawfully takes possession or makes the required deposit into the Court. City of Fort Worth v. Corbin, supra.

Damages occurring prior to the date

of taking can be recovered from an entity that did not exercise its power of eminent domain prior to the injury. Gully v. Southwestern Bell Telephone Co., 774 F.2d 1287 (5th Cir. 1985). Those damages would be for the time period from the date of the damage or injury until the lawful taking of the property condemned. Id.

A judgment cannot be conclusive of any issue that could not have been adjudicated in that case. Davis v. First State Nat. Bank of Waco, 161 S.W.2d 467 (Tex.Comm.App. 1942).

The attorneys for both AUSTIN and JOLEEWU recognized that the commissioners' hearing was not the forum for such a recovery. (Tr. 167-170, Appendix). The damages sought by JOLEEWU in this case were clearly excluded from

the commissioners' award by both applicable law and agreement of the parties, thus the judgment cannot be a bar to litigation involving the recovery of those damages.

AUSTIN IS LIABLE FOR DAMAGES REGARDLESS OF THE GOVERNMENTAL OR PROPRIETARY NATURE OF ITS ACTIONS

In San Antonio River Authority v. Garett, 528 S.W.2nd 266 (Tex.Civ.App.--San Antonio 1977, ref'd, i.r.e.) the Court of Appeals held that the defense of governmental function is not available where the conduct of the government amounts to a taking and damaging within the provisions of Article I, Section 17 of the Texas Constitution.

In City of Austin v. Teague, 570 S.W.2d 389 (Tex. 1978) the City sought to escape liability for damages, asserting

that its actions were an exercise of its police power and thus immune as a governmental function. City of Austin v. Teague, supra, involved inverse condemnation by the City of Austin.

EXCERPT FROM CONDEMNATION HEARING STATEMENT OF FACTS INCLUDED IN RECORD EXCERPTS AT COURT OF APPEALS

No. 1656

STATE OF TEXAS	X	CONDEMNATION
AND CITY OF	X	PROCEEDINGS FILED
AUSTIN	X	IN THE COUNTY
	X	COURT
VS.	X	
	X	
JOLEEWU, LIMITED	X	AT LAW OF TRAVIS
ET AL	X	COUNTY, TEXAS

- -

APPEARANCES

ELLIOTT MITCHELL, Assistant City Attorney, Post Office Box 1088, 708 Colorado Street, Austin, Texas 78767.

FOR CONDEMNOR

ROBERT D. LYBRAND, 401 Expressway Tower, 6116 North Central Expressway, Dallas,

that correct?

A That is correct.

Q So you have a 20 percent vacancy rate over in the park?

A Yes - well, the park is a much greater vacancy in reality than what we gave it.

Q Do you know why the park's vacancy rate is much greater?

A I think I know why, it is much greater. Because, as you can see in my little handout, all of other parks and the competing parks in town are in the same boat.

Q Do you know why these trailers -- and I'm pointing specifically to the ones in the easement, do you know why they left the park?

A Yes, sir.

Q Could you tell us why they left the

park?

A To my understanding, they were removed through the federal aid relocation procedures, and they were moved as a part of this acquisition.

MR. MITCHELL: At this time I want to admonish the commissioners not to consider, prior to the date of taking, losses by reason of these trailers moved. There is another lawsuit pending. There is another inverse condemnation lawsuit pending which is complaining of our notice to these - the tenants of the mobile homes which are located in this area, because at that time we anticipated that we would be able to move forward with this suit on a much earlier time frame. Since it took longer than anticipated to get this parcel through the condemnation process, the tenants

were notified much in advance of the date of taking, which is obviously today's hearing, I believe sometime in September of '87.

So consequently, they have filed numerous condemnation suits against the city, which is a live pending inverse condemnation action.

MR. WILLIAMS: They, being the tenants or the landowner, but not a class action suit or ---

MR. MITCHELL: Right, so we have got the inverse condemnation action pending now against the city for the damages which arise out of that premature notification, if any.

So consequently, I am asking you-all not to consider that, because that is going to be taken care of by negotiations or by trial in that particular lawsuit.

Hopefully we will settle it. For purposes of this action, I ask that you consider it based on the testimony that Mr. Corbitt gave.

MR. LYBRAND: And I am in agreement with Mr. Mitchell. I only point that out and make the point that the low vacancy rate is not a natural occurrence in the market, that the low vacancy rate at this park, 12 of these were moved out.

MR. WURLITZER: Fifteen

MR. LYBRAND: Fifteen were moved out by the city, totaling 20 percent of our occupancy.

MR. MITCHELL: There is a disputed fact issue, though. If we are going to get into that, we would like to go ahead - if he is going to represent to you that 15 were moved out, we would like

to present testimony on how many moved out, and you know ---

MR. LYBRAND: Let me make my point. He is absolutely wrong on damages or anything occurring before today because these vacancies are not in here. But what I am saying is that some of those were not natural market and that the current occupancy is not all the result of natural market forces, in that it should be held against us for low market rate on something that was out of our control.

Mr. Williams: Your are saying there is